# IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

**OSA No. 4 of 1999**

Judgment reserved on: 27.11.2007

Date of Decision: December 10, 2007

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State of H.P. … Appellant

Versus

M/s Jagdish Ram & sons … Respondent.

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Coram:

**The Hon'ble Mr. Justice Deepak Gupta, Judge.**

**The Hon'ble Mr. Justice V.K.Ahuja, Judge.**

***Whether approved for reporting? No.***

For the Appellant(s) : Mr. M.S.Chandel, Advocate General with Mr. R.M.Bisht, Dy. Advocate General.

For the Respondent(s) : Mr. J.S. Bhogal, Sr. Advocate with Mr. Suneet Goel, Advocate.

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Deepak Gupta, J

The respondent (hereinafter referred to as the plaintiff) was awarded a contract for construction of Hostel and Rest House building at Water Sports Complex at Pong Dam, Tehsil Jawali, District Kangra. Consequently, agreement No.2 of 1987-88 was entered into between the parties. Disputes arose between the parties. In terms of the arbitration clause contained in the agreement, the said disputes were referred to the Superintendent Engineer, Arbitration Cell, HP PWD, Solan for decision as sole Arbitrator.

The plaintiff filed his claim. The State also filed reply to the claim and filed counter-claim. The parties led evidence and the Arbitrator made an award in favour of the plaintiff on 1.7.1994 and after taking into consideration all the amounts awarded to the respective parties a sum of Rs. 3,78,898/- was awarded in favour of the plaintiff. The Arbitrator thereafter submitted record of the arbitration to this Court with an application that the award may be made rule of the Court. Notice of the filing of the award was given to the parties. No objections were filed by the plaintiff. However, the State filed objections under Sections 30 and 33 of the Indian Arbitration Act, 1940 ( hereinafter referred to as the Act).

The following issues were framed in the said objection petition:-

1. Whether the Arbitrator has mis-conducted himself and the proceedings, as alleged, if so, its effect?..OP Objector.
2. Whether the claims covered under Clause 10-C of the agreement were not arbitrable, as alleged, if so, its effect? OP Objector.
3. Relief.

In respect of issue No.2, a learned Single Judge of this Court felt that there was some conflict of opinion of this Court and the following question was referred for consideration by a larger Bench of this Court:-

> " When there is a specific provision in a contract between the State and the person who has been awarded the work of construction, of a public nature, that any escalation in the rates of both materials and labour, during the progress of the

> work is to be decided by the competent authority, so mentioned in the agreement, and whose decision in the matter is final and binding between the parties, can such a claim be adjudicated by the Arbitrator in consequence of any arbitration clause in the agreement?

The Division Bench answered the question by holding that the disputes falling under Clauses 2, 3 and 10-C of the agreement are not arbitrable.

The learned Single Judge held that in view of the decision of the reference, issue No.2 does not survive for decision. Despite holding so, the learned Single Judge went on to hold that the court has no jurisdiction to examine the correctness of the award on merits and upheld the findings of the Arbitrator. The main argument on behalf of the State was in respect of claim No.4 and it was urged by the State that the said claim was filed under Section 10-C of the agreement and was not arbitrable in terms of the law laid down by this Court. The learned Single Judge rejected the contention of the State and upheld the award of the Arbitrator in respect of claim No.4 and hence the present appeal.

I have heard Shri M.S.Chandel learned Advocate General and Shri R.M.Bisht, learned Deputy Advocate General, for the appellant-State and Shri J.S.Bhogal, learned Senior Advocate, for the respondent.

The case of the State in respect of claim No.4 is that this claim could not be the subject matter of arbitration and the Arbitrator had no jurisdiction to decide this claim since this court

had held in two cases that a claim filed under clause 10-C of the agreement, falls outside the jurisdiction of the Arbitrator.

On the other hand, Shri J.S.Bhogal, learned senior counsel for the plaintiff, has contended that the claim of the plaintiff was not a claim under Section 10-C but was a claim under the general law of Tort for the excess amount spent due to delay in construction which was attributable to the State. It is contended that even if it is held that the claim falls under clause 10-C then also according to Shri J.S. Bhogal, what is not arbitrable is the decision of the Superintending Engineer deciding who is responsible for the delay. According to him, only this part is not arbitrable and the dispute with regard to the amount payable is arbitrable. He further submits that this point has not been taken into consideration in the earlier judgments of this Court and, therefore, the said judgments require re-consideration.

To appreciate the arguments of the parties, it would be first appropriate to refer to the relevant portion of Clause 10-C of the agreement, reads as follows:-

> **"CLAUSE 10-C.** If during the progress of the works, the price of any materials incorporated in the works, (not being a material supplied from the Engineer-in-charge's stores in accordance with clause 10 hereof) and /or wages of labour increases as a direct result of the coming into force of any fresh law, or statutory rule or order (but not due to any charges in sales tax) and such increase exceeds ten per cent of the price and/or wages prevailing at the time of acceptance of the tender for the work, and the contractor thereupon necessarily and properly pays in respect of that materials (incorporated in the works) such increased price and/or in respect of labour engaged on the execution of the work such increased wages, then the amount of the

> contract shall accordingly be varied; provided always that any increase so payable is not, in the opinion of the Superintending engineer (whose decision shall be final and binding) attributable to delay in the execution of the contract with the control of the contractor."

A bare reading of this clause clearly shows that if during the process of the works the price of material to be utilized in the works which is not supplied by the Engineer-in-charge or the wages increase by more than 10 per cent and the contractor has to pay this increased amount, then the contractor is entitled to the increased price/ wages provided that the increase so payable is not in the opinion of the Superintending Engineer (whose decision is final )attributable to delay on the part of the contractor. It is thus clear that the claim for enhancement of the amount of contract due to increase in the price of material used or increased is squarely covered under Clause 10-C. Therefore, the arguments of Shri J.S. Bhogal that the claim of the plaintiff does not fall under Clause 10-C cannot be accepted. In fact, the Arbitrator while dealing with claim No.4 has clearly held that the claim for escalation is governed by clause 10-C. He has also held that if proper extension is granted under clause 10(5) then the agreement is deemed to be extended and, therefore, the amount is payable in terms of Clause 10-C.

The next argument of Shri J.S. Bhogal is that in terms of Clause 10-C quoted above, what is final and not arbitrable is the decision of the Superintending Engineer as to who is responsible for the delay. Shri J.S. Bhogal submits that in this case the Superintending Engineer has taken a decision in the following terms:-

> "It has been proved beyond doubt that the responsibility for non-execution of balance items lies mostly on the department and to some extent on the contractor especially where clear decisions were available with him to execute the same."

It is only this decision on the question of delay according to Shri Bhogal which is final and the claim for assessment of compensation could have been decided by the Arbitrator. This argument sounds attractive. However, the law laid down by this Court by two separate Benches of this Court is to the contrary. The Division Bench comprising of Justice Srinivasan, CJ and Justice P.K.Palli, J, in **State of H.P.** versus **Surinder Singh** (FAO No. 142 of 1985) decided on 13.11.1996, dealt with a case where a learned Single Judge had over-ruled the objections of the State that clauses 2, 3 and 10-C of the agreement could not be made subject matter of the agreement and the Arbitrator has no jurisdiction in respect of any dispute under those clauses. The Division Bench relied upon a judgment of the apex Court in **Vishwa Nath Sood** v. **Union of India**, AIR 1989 SC 952, held that clauses 2, 3 and 10-C between the parties were out side the scope of the Arbitrator's jurisdiction.

In ***Civil Suit No. 139 of 1994 and other cases*** out of which this appeal arises, the same question was referred to a larger Bench as mentioned hereinabove. The Division Bench consisting of Justice Kamlesh Sharma and Justice Surinder Sarup, JJ, have taken into consideration the judgment rendered by this Court including the judgment in ***Surinder Singh's case*** (supra) and answered the question in the following terms:-

> "When there is a specific provision in a contract between the State and the person who has been awarded the work of construction, of a public nature, that any escalation in the rates of both materials and labour, during the progress of the work is to be decided by the competent authority as mentioned in the agreement and whose decision in the matter is final and binding between the parties, such claim cannot be adjudicated by the Arbitrator in consequence of any arbitration clause in the agreement? "

The Court further went on to hold as follows:-

> This is so in view of the law laid down by the apex Court in *Vishwanath Sood's* case (supra) and the provisions of clauses 2, 3, and 10 C of the present agreement no.5 of 1986-87 between the parties herein. This is further made clear by the opening words in the said agreement which are to the effect "except where otherwise provided in the contract…….:. In other words, where the contract agreement between the parties, as in the present case, provides for final adjudication of any dispute or claim between the parties inter se by the authorities so designated under the said agreement, as clause 10-C in the present case, the jurisdiction of the Arbitrator is barred in toto."

In our opinion, this judgment clearly covers the case and it has been held that a dispute or claim between the parties under clause 10-C is beyond the jurisdiction of the Arbitrator and cannot be the subject matter of an arbitration award.

Shri J.S. Bhogal faced with this judgment, contends that these two judgments require re-consideration and reiterates that what is final and pending is the decision of the Superintending Engineer qua the issue of delay and not qua the assessment of the entire amount payable.

In view of the fact that two separate Division Benches have considered the question and have taken a decision, we do not feel it necessary to refer the matter to a larger Bench. We are bound by the earlier judgments of this Court. Accordingly, we hold that claim No.4 fell squarely within the meaning of clause 10-C and could not have been the subject matter of arbitration proceedings and the award of the learned Arbitrator awarding Rs. 1,20,000/- under claim No.4 is without jurisdiction and is liable to be set aside.

The appeal is accordingly allowed. The order of the learned Single Judge making the award rule of the Court is upheld but with the modification that the award of the Arbitrator awarding Rs.1,20,000/- under claim No.4 is without jurisdiction and is liable to be set aside.

The appeal is disposed of in the aforesaid terms. No order as to costs.

( Deepak Gupta ), J

December 10, 2007 ( V.K. Ahuja ),J.

s.